Supreme Court, U. S.
FILED
AUG 21 1972
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-

~~72-298~~

ALEX COOLEY, ELIZABETH HERRING, RONNIE MAC KEY, and M. E. JOHNSON, JR., individually and on behalf of all others similarly situated,

Petitioners,

v.

WILLIAM BAER ENDICTOR, Assistant Solicitor of the Criminal Court of Fulton County; HERBERT JENKINS, Chief of Police of the City of Atlanta; JACK C. McENTIRE, Captain of the Vice Squad of the Police Department of the City of Atlanta; HINSON McAULIFFE, Solicitor General of the Criminal Court of Fulton County; LEWIS SLATON, District Attorney of the Atlanta Judicial Circuit; and LEROY STYNCHCOMBE, Sheriff of Fulton County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of

Georgia, Atlanta Division, is reported at 340 F. Supp. 15, and a copy of it is appended at 1a. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 458 F.2d 513, and a copy of it is appended at 15a. The denial of the petition for rehearing and suggestion for rehearing en banc is reported with the main opinion at 458 F.2d 513, and a copy of it is appended at 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1972, and a timely petition for rehearing and suggestion for rehearing en banc was denied on May 22, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether persons who have been officially threatened with, but have not yet suffered, mass and repeated prosecutions in a state court under an unambiguously drafted statute which is facially void for overbreadth and which abridges their first amendment rights of free expression, and who have censored their expression temporarily in response to those threats, thus placing themselves in compliance with the statute, must plead and prove, as a prerequisite to the convening of a three-judge court to consider their prayers for declaratory and injunctive relief, that they have already been harassed in bad faith; or, otherwise stated, whether Younger v. Harris, 401 U.S. 37 (1971), Samuels v. Mackell, 401 U.S. 66 (1971), Boyle v. Landry, 401 U.S. 77 (1971), Perez

v. Ledesma, 401 U.S. 82 (1971), Dyson v. Stein, 401 U.S. 200 (1971), and Byrne v. Karalexis, 401 U.S. 216 (1971), were intended to reverse the holding in Zwickler v. Koota, 389 U.S. 241 (1971).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The complaint filed in the district court below was an attack on grounds of the first, fifth, sixth, ninth and fourteenth amendments of the Constitution of the United States and 42 U.S.C. §§ 1981, 1983 and 1988 upon a Georgia statute:

> Georgia Code §26-2105. (a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Code § 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.
>
> (b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor.

whose parent statute, not attacked, provided:

> Georgia Code §26-2011. A person com-

> mits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:
>
> (a) An act of sexual intercourse;
> (b) A lewd exposure of the sexual organs;
> (c) A lewd appearance in a state of partial or complete nudity;
> (d) A lewd caress or indecent fondling of the body of another person.

"A lewd appearance has. . .been defined, and the exposure of private parts through complete nudity meets the definition. See Piercy v. State, 1955, 92 Ga. App. 599." Conger v. Lull, C.A. No. 14,064 (N.D. Ga., 9-23-70) (three-judge court).

The complaint requested convention of a three-judge court pursuant to 28 U.S.C. § 2281:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

but no three-judge court was convened.

Disposition by the district judge was based, however, not upon any constitutional, statutory or regulatory provision, but upon an extrapolation of the holdings in Younger v. Harris, 401 U.S. 37 (1971), Samuels v. Mackell, 401 U.S. 66 (1971), Boyle v. Landry, 401 U.S. 77 (1971), Perez v. Ledesma, 401 U.S. 82 (1971), Dyson v. Stein, 401 U.S. 200 (1971), and Byrne v. Karalexis, 401 U.S. 216 (1971).

STATEMENT OF THE CASE

a. The Proceedings Below

The complaint below was filed as a class action on July 8, 1971, and sought the convention of a three-judge court and, inter alia: A declaration that Ga. Code §26-2105, which impinges on first amendment rights, is unconstitutional on its face and as applied as being overbroad in its sweep under the standards of the due process clause of the fourteenth amendment of the Constitution of the United States; and temporary and permanent injunction against the enforcement of the new statute.

On July 20, 1971, no three-judge court being convened, the district judge ordered the plaintiffs "to show cause as to the existence of bad faith harassment and, in its absence, why [the] case should not be dismissed...", believing that "Younger v. Harris [401 U.S. 37 (1971) and] Samuels v. Mackell [401 U.S. 66 (1971)], etc...provide that neither declaratory nor injunctive relief may be provided except under exceptional circumstances constituting bad faith harassment", [R. 81-82].

On August 3, 1971, the defendants filed

their answer and motion to dismiss the complaint.

Hearing on the show cause order only was held before a single district judge on August 5, 1971 [R. 1-47], at which no evidence was introduced but argument was made by all parties; and the plaintiffs filed a supplemental brief arguing that bad faith harassment, which they had not plead, was not a necessary showing, especially since prosecution was threatened but not pending.

By order filed August 26, 1971, no plenary hearing having been held, the court found that the controversy before it was not moot [R. 100]; that "for plaintiffs to merit federal injunctive relief they must demonstrate bad faith on the part of these defendants," that there was "no evidence on which to base such a conclusion," and that therefore "federal injunctive relief is not warranted in the present case," [R. 102]. The court found the grant of declaratory relief inappropriate because it might be enforced by injunction, already found to be unwarranted [R. 104]; because such relief would, even without an injunction, disrupt the state's criminal processes by precluding initiation of criminal prosecutions under the statute declared unconstitutional [R. 104]; and because a contrary result would encourage law enforcement officials to arrest without warning, [R. 106]. Defendants' motion to dismiss was therefore granted August 26, 1971.

Notice of appeal to the United States Court of Appeals for the Fifth Circuit was filed September 24, 1971. A memorandum opinion affirmed the district court April 3, 1972, and a timely petition for rehear-

ing and suggestion for rehearing en banc was denied May 22, 1972.

b. The Facts

Two of the four petitioners were creators of, and performers in, a multi-media musical play[1] named "Stomp;" and one of the petitioners was a producer who booked the play into Atlanta after performances across the Western world from Texas to Yugoslavia.[2]

Two of the scenes in the play, which had been presented in full on the national television services of Holland and Germany, involved discreet nudity: one a symbolic birth scene and one a river-swimming scene.

On June 16, 1971 after the play opened, the producer was summoned to an interview with a captain of the vice-squad of the City of Atlanta police department and an assistant solicitor of the Criminal Court of Fulton County, both defendants below. These men told him that they believed the scenes in question to be violations of the newly enacted statute, and that the scenes would have to be excised from the work, on penalty of prosecution.

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1. A drama which combines live acting, dancing and vocal and instrumental music with cinema and still photography, lighting effects, and sometimes other arts.

2. No factual hearing having been had, the facts are set out here as plead by the petitioners.

The producer related this interview to the cast of the play, including the creator-performer plaintiffs; and the cast then voted to bowdlerize their work rather than risk arrest, and seek judicial relief against the violence thereby done to their freedom of expression and to the artistic integrity and political impact of their work. A further interview with the same two defendants was requested and obtained on June 30, 1971, and a clarification of the previous interview was asked. The two defendants rejected the idea of a test case, and said to the producer and his attorney that unless the play remained bowdlerized they would arrest everyone connected with the play, and would do so every night, until the show closed "or the bail money ran out," [R. 58-60].

When the plaintiffs, including a fourth plaintiff, a member of the theatre-going public, then filed their complaint below, no proceeding was pending in any other court between the parties, and no prosecution was pending against the plaintiffs in any court to enforce the provisions of the statute complained of.

REASONS FOR GRANTING THE WRIT

I. THE REQUIREMENT OF A SHOWING OF BAD FAITH HARASSMENT BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH THE RULE IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

In affirming a holding that petitioners, who allege that they have been officially threatened with mass and repeated future prosecutions in a state

court under an unambiguously drafted overbroad statute which impinges on first amendment rights, and who have censored their expression temporarily in response to those threats in order to comply with the statute, must plead and prove, as a prerequisite to consideration of their action for declaratory and injunctive relief, that they have already been harassed in bad faith, the United States Court of Appeals for the Fifth Circuit is in square conflict with the United States Court of Appeals for the First Circuit, in Wulp v. Corcoran, 454 F.2d 826 (1972).

The issues involved in non-pending prosecution situations were recently decided in favor of intervention by the United States Court of Appeals for the First Circuit in Wulp v. Corcoran, 454 F.2d 826 (1972), when the court said, at p. 832:

> The question remains: does the same rigorous standard of "great and immediate" harm as defined in Younger apply to a case when no state prosecution is pending but there is every reasonable expectation that a violation would be criminally prosecuted? That is, must a plaintiff in such a case show bad faith and harassment, injury more than that incidental to any criminal proceeding, chilling effect more than that stemming from any vague or overbroad law regulating conduct? If so, then we would have to concede that there is no room left for the use of the Federal Declaratory Judgment Act, 28 U.S.C. §2201, in testing state and federal criminal statutes. While Mr. Justice Brennan's views in Perez v. Ledesma, 401 U.S. at

> 93, did not prevail in view of the majority's recognition of a prior pending state prosecution, 401 U.S. at 86 n. 2, we cannot dismiss the Congressional history reviewed by him, 401 U.S. at 112-115, expressly contemplating resort to the milder, less intrusive, and more timely remedy of a declaratory judgment to test criminal laws, both state and federal. See, e.g., Lewis v. Kugler, 446 F.2d 1343, 1347-1348 (3d Cir. 1971); Anderson v. Vaughn, 327 F.Supp. 101, 102 (D.Conn.1971) (three-judge court). Were the law to be that a plaintiff could not obtain a declaratory judgment that a local ordinance was unconstitutional when no state prosecution is pending unless he could allege and prove circumstances justifying a federal injunction of an existing state prosecution, the Federal Declaratory Judgment Act would have been pro tanto repealed. (Footnotes omitted).

To like effect are the decisions in Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971) and Crossen v. Breckenridge, 446 F.2d 833 (6 Cir. 1971).

II. THE PREREQUISITES TO FEDERAL RELIEF FROM THREATENED PROSECUTIONS SHOULD BE DELINEATED BY THIS COURT.

The action of the Court of Appeals for the Fifth Circuit also has the effect of subsuming under the holdings in Younger v. Harris and its companion cases an important question which has not been, but should be, settled by this Court, and which was specifically reserved and excep-

ted by this Court from those holdings, that issue being the prerequisites to the availability in federal courts of injunctive and declaratory relief from future threatened state criminal prosecutions.

Petitioners conceive the essential teachings of the Younger cases to have been that abstention is usually appropriate where there is a pending state prosecution:

> We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun.
> Younger v. Harris, 401 U.S. 37, at 41 (1971);

that declaratory relief should normally not be granted if injunctive relief is inappropriate where there are pending state proceedings:

> We therefore hold that, in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.
> Samuels v. Mackell, 401 U.S. 66 at 73 (1971);

and that persons who are not threatened with prosecution have no standing to sue in federal court:

> Not a single one of the citizens who brought this action had ever been prosecuted, charged, or even arrested under the particular intimidation statute which the court below held unconstitutional. All the charges of the complaint deal broadly and generally with all the state statutes and city ordinances that the appellees originally challenged. In fact, the complaint contains no mention of any specific threat by any officer or official of Chicago, Cook County, or the State of Illinois to arrest or prosecute any one or more of the plaintiffs under that statute either one time or many times. Boyle v. Landry, 401 U.S. 77, at 80-81 (1971).

Cases such as the instant one seem to have been carefully reserved by this Court. For instance, the plurality in Younger (Chief Justice Burger and Justices Black and Blackmun) stress, 401 U.S. at 49, that "[h]ere a proceeding was already pending in the state court . . ." Justices Brennan, White and Marshall, concurring, distinguish Younger from Zwickler v. Koota, 389 U.S. 241 (1967) because "in Zwickler no state proceeding was pending at the time jurisdiction attached in the federal court," 401 U.S. at 57 (footnote).

Justices Stewart and Harlan, concurring, stress the importance of "a recognition of the areas into which today's holdings do not necessarily extend . . . . [T]he Court . . . does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from future state criminal prosecutions." 401 U.S. at 54-55.

Indeed, if the courts below are correct, this Court should address itself to the question of the continued vitality of Zwickler v. Koota. Here, as there, at page 249, "we have no question of a construction of [the statute] that would 'avoid or modify the constitutional question.'. . ." The plaintiffs' "attack is that the statute, although lacking neither clarity nor precision, is void for 'overbreadth,' that is, that it offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms . . .'" 389 U.S. at 250. Here, as there, because of state canons of construction (See Barnes v. Carter, 120 Ga. 895, 898 (1904) and Edmondson v. Dyson, 7 Ga. 512, 515 (1849), "state court construction cannot narrow [the statute's] allegedly indiscriminate cast and render unnecessary a decision of [plaintiffs'] constitutional challenge," 389 U.S. at 250. Here, as there, "the attack upon the statute on its face is for repugnancy to the First Amendment." 389

U.S. at 252. And here, as there, "no 'special circumstance' prerequisite to application of the doctrine of abstention is present . . . and it was error to refuse to pass on [plaintiffs'] claim for a declaratory judgment," 389 U.S. at 252.

There is nothing in Younger v. Harris and its companions to indicate that the unanimous judgment in Zwickler has been reversed, and that all complaints seeking a declaration of the unconstitutionality of state criminal statutes are subsumed under the Younger doctrine, without respect to the pendency of a state prosecution.

Indeed, it is only a few weeks ago that this Court said by way of dictum in Lake Carriers' Association v. MacMullen, ____ U.S. _____, 92 S.Ct. 1749, 1757 (1972):

> In Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971), this Court held that, apart from "extraordinary circumstances," a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive re-

lief are met. See generally Perez v. Ledesma, 401 U.S. 82, 93 (1971) (separate opinion).

III. THE DISCRETION NOT TO CONVENE A THREE-JUDGE COURT GRANTED DISTRICT JUDGES BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH THE RULE IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

In affirming the right of a single district judge to determine that the abstention doctrine applied in petitioners' action contesting the validity of a state statute, the United States Court of Appeals for the Fifth Circuit is in square conflict with the position of the United States Court of Appeals for the Second Circuit in Abele v. Markle, 452 F.2d 1121 (1971).

The United States Court of Appeals for the Second Circuit has decided that, where the pleadings properly assert jurisdiction under a three-judge court statute, abstention should be exercised only by a three-judge court.

> [W]e find that the district court did not have the power to dismiss the complaint for lack of jurisdiction, since it cannot be said that these decisions compel abstention here. The question whether to abstain under the doctrine enunciated in Younger and Samuels, going as it does to the merits and calling for use of discretion as to whether equitable jurisdiction should be exercised, is one for the three-judge court rather than the single dis-

trict judge. Idlewild Bon Voyage Liquor Corp. v. Epstein, supra; Bjarsch v. DiFalco, 300 F. Supp. 961, 968 (S.D.N.Y. 1969); Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299, 309 (1963). The single judge asked to convene a three-judge court is limited to determining (1) whether the constitutional question is substantial; (2) whether the complaint at least formally alleges a basis for equitable relief; and (3) whether the case comes within the requirement of the three-judge statute. Idlewild Bon Voyage Liquor Corp. v. Epstein, supra.

Here any doubts as to the substantiality of the constitutional question which might be raised by the Supreme Court's recent decision in United States v. Vuitch, 402 U.S. 62, 91 S. Ct. 1294, 28 L.Ed.2d 601 (1971) (upholding District of Columbia's anti-abortion statute as interpreted by it) are dispelled by the Court's agreeing to hear argument on the merits in Doe v. Bolton, supra, [319 F. Supp. 1049, 1052 (N.D. Ga. 1970) (three-judge court) prob. juris. postponed to hearing on the merits, 402 U.S. 941 (1971)] and Roe v. Wade, supra, [314 F. Supp. 1217 (N.D. Tex. 1970 (three-judge court), prob. juris. postponed to hearing on the merits, 402 U.S. 941 (1971)] where the constitutionality of similar state anti-abortion laws was challenged. Since the criteria for convening a three-judge court are satisfied, the district judge's duty is to grant the motion and leave the issue of

abstention to the three-judge court for decision.
Abele v. Markle, supra, at 1125-26.

That court was not unmindful of the possibility of futile gestures. The opinion continued:

> Where undisputed facts clearly dictate that there can be but one ruling by a three-judge court, if convened, we have on occasion, in the interest of conserving judicial resources, affirmed the district court's denial of a motion to convene such a court rather than remand the case for a useless and expensive ritual. Astro Cinema Corp. Inc. v. Mackell, 422 F.2d 293, 298 (2d. Cir. 1970); Green v. Board of Elections, 380 F.2d 445, 449 (2d Cir. 1967), cert. denied, 389 U.S. 1048 (1968). The present appeal, however, is not an appropriate one for the application of that doctrine since the parties have advanced conflicting arguments which require the exercise of a three-judge court's discretion. On the one hand it is asserted that since there is no state court interpretation that could avoid or modify the constitutional questions raised here, a federal court may not abstain. Zwickler v. Koota, 389 U.S. 241, 248 (1967). On the other hand, defendants contend on the basis of the reasoning adopted by Judge Clarie [the district court judge] as a ground for dismissal for lack of jurisdiction that abstention is authorized by Younger v. Harris, supra. Since a genuine issue appears to be presented as to the propriety of

> abstention, which must be decided by a three-judge court, we take no position on the merits of that issue. Abele, supra, at 1126.

The decision of the district court in the instant case to dismiss the complaint was an exercise in abstention. The issue of the necessity for bad faith was a substantial issue properly for a court of three judges. For this reason alone, certiorari should be granted.

CONCLUSION

For the above reasons, petitioners respectfully request that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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v.

William Baer ENDICTOR, Assistant Solicitor of the Criminal Court of Fulton County, et al., Defendants.

Civ. A. No. 15359.

United States District Court,
N. D. Georgia,
Atlanta Division.
Aug. 26, 1971.

SIDNEY O. SMITH, Chief Judge.

This is a class action in which plaintiffs seek declaratory and injunctive relief against enforcement of Georgia's indecent exposure statute. Ga.Code Ann. § 26-2105; Ga.L.1971, p. 344.[1] The action

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1. This Act provides: "26-2105. (a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

"(b) Every person who procures, counsels or assists any person to engage

is said to arise under the First, Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution and Title 42 U.S.C.A. §§ 1981, 1983 and 1988. The Court's jurisdiction is invoked pursuant to 28 U.S.C.A. §§ 1331 and 1343.

A prayer for injunctive relief against enforcement of a state statute, on the ground that the statute is repugnant to the federal Constitution, must be heard by a three-judge court, 28 U.S.C.A. § 2281, and plaintiffs have requested that such a court be convened. Significantly, however, the statute challenged here is a state criminal statute. Because of this fact, the Court has from the first entertained serious doubts concerning the pro-

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in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor."

The parent statute, not attacked here, provides: "26-2011. Public indecency.--A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor: (a) An act of sexual intercourse; (b) A lewd exposure of the sexual organs; (c) A lewd appearance in a state of partial or complete nudity; (d) A lewd caress or indecent fondling of the body of another person. (Acts 1968, pp. 1249-1301)"

priety of federal intervention. These doubts stemmed in general from a stated policy of the federal courts against interference in state criminal matters and in particular from a series of recent decisions in the Supreme Court. See Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971); Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); Dyson v. Stein, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971); Byrne v. Karalexis, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971).[2] Consideration of judicial economy required that this threshold question be determined before a three-judge court was empanelled, and the Court accordingly scheduled a hearing for this purpose on August 5, 1971. On the basis of this hearing the Court makes the following:

FINDINGS OF FACT

Plaintiff Cooley is the producer of the musical play entitled "Stomp" and plaintiffs Herring and Mackey are artists who perform in that play. Plaintiff Johnson is a member of the theater-going public in-

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2. Hereafter referred to collectively as "Younger v. Harris, etc."

terested in viewing works of art in their unbowdlerized form. Defendants are the chief law enforcement and prosecuting officials of Fulton County and the City of Atlanta, and are sued in their official capacities.

During June, 1971, "Stomp" was being offered to the viewing public in Atlanta. Defendants Endictor and McEntire attended a performance and concluded that the nudity exhibited in two scenes, the so-called "birth" and "river" scenes, exceeded the bounds prescribed by Georgia's recently enacted indecent exposure statute. On June 16, 1971, they made their views known to plaintiff Cooley and informed him that, if those scenes were not removed or altered, prosecutions would be initiated against all persons connected with the play. Cooley relayed this information to the members of the cast, who decided to bowdlerize the two scenes rather than risk prosecution.

At the request of plaintiffs' counsel a second meeting was had with Endictor and McEntire on June 30, 1971. Plaintiffs suggested that defendants make a test case against an individual member of the "Stomp" company, but in the meantime allow plaintiffs to perform the play in its original form. Defendants responded that they could not agree to any arrangement which would sanction violation of a statute they were sworn to enforce. Plaintiffs also offered to warn their patrons of the nudity they could expect to see and to exclude all minors from the audience. Defendants

did not regard this as an acceptable alternative, however, since in their view the law did not countenance the exhibition of obscenity under any circumstances. This meeting, then, proved unavailing and the situation remained essentially unchanged. Having been unable to work out a mutually acceptable solution in conference, plaintiffs filed the present action. Between the date of the filing and the date of the hearing, however, the building in which "Stomp" was being performed was destroyed by fire. Apparently no new facility in which the play's original engagement could be completed was ever located. However, it appears that plaintiffs have agreed to perform the play for the students at the Georgia Institute of Technology in the near future and that they intend to reopen to the public generally as soon as space can be found. Although plaintiffs have indicated that they will continue to delete the allegedly offensive matter from their performances, they remain adamant in their desire to put the play on in its unexpurgated form and in their belief that they have a constitutional right to do so.

CONCLUSIONS OF LAW

A. Mootness

Defendants argue that since plaintiffs are not now performing the objectionable scenes, and since defendants do not intend to bring prosecutions on the basis of performances given prior to June 16, 1971,

the entire controversy has now become moot. The Court cannot agree. As indicated above, plaintiffs have made no concessions concerning their wish to perform the play in its original form, nor concerning their right to do so. Defendants acknowledge that if the objectionable scenes are restored, plaintiffs will be prosecuted. Under these circumstances, the Court is satisfied that a live controversy persists and that plaintiffs need not, as defendants phrase it, actually "throw the tea into the harbor" by violating the law, to satisfy the threshold requirement of any action.

B. Injunctive Relief

In Younger v. Harris, etc., the Supreme Court held that, where a state prosecution was already pending at the time the federal action is filed, a federal court could properly enjoin the state proceedings only under "exceptional circumstances". In general, the plaintiff must make a showing of irreparable injury, the traditional prerequisite for injunctive relief. He must show in addition, however, that the danger of irreparable injury is both "great and immediate", which normally requires that he show bad faith and an intention to harass on the part of the prosecuting officials. In so holding, the Court emphatically reaffirmed the long-standing federal policy against interference with the normal administration of a state's criminal laws. As the Court

pointed out in Younger v. Harris itself, this policy is firmly embedded in our history and has its roots in considerations that are both legal and political. In the Court's own language, these considerations are, first:

> "* * * the basic doctrine of equity jurisprudence that courts of equity should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. . . ." 401 U.S. pp. 43, 44, 91 S.Ct. p. 750.

and second:

> "* * * the notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . ." 401 U.S. p. 44, 91 S.Ct. p. 750.

Plaintiffs correctly point out, however, that five of the six cases in the Younger v. Harris group, unlike the present case, are cases in which an actual prosecution was already in progress when the federal suit was commenced. In addition, in Younger v. Harris the Court was

at pains to emphasize that it was expressing no opinion concerning the propriety of federal injunctive relief when this situation was not present. Plaintiffs argue, therefore, that Younger v. Harris, etc., simply does not speak to the circumstances of the present case. The Court will assume for argument's sake that plaintiffs are correct in their position, though there is some reason to think otherwise.[3] It is nevertheless clear, under previous decisions of the Supreme Court, that a plaintiff seeking to enjoin a threatened prosecution carries no lesser burden of proof than one who seeks to enjoin a prosecution already begun. See Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943); Williams v. Miller, 317 U.S. 599, 63 S.Ct. 258, 87 L.Ed. 489 (1942); Watson v. Buck, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1941); Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927 (1926); Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). This means, of course, that for plaintiffs to merit federal injunctive relief they must demonstrate bad faith on the part of these defendants. As plaintiffs conceded at the hearing, however, there simply is no evidence on which to base such a conclusion. In view of the very recent enactment of the indecent exposure statute, and plaintiffs' probable ignorance of its terms,

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3. See Boyle v. Landry, discussed below.

defendants chose to warn plaintiffs before invoking the criminal process against them. Later, when plaintiffs desired further discussion on the matter, defendants willingly complied. If any judgment concerning defendants' conduct is called for, it is that they exercised the utmost good faith.

In light of this finding, the general policy expressed in Younger v. Harris, etc., and the explicit holdings of prior decisions, the Court is compelled to conclude that federal injunctive relief is not warranted in the present case.

C. Declaratory Relief

Plaintiffs ask also for a declaratory judgment that the Georgia statute is unconstitutional, both on its face and as applied to them. The nub of the problem, as it was aptly phrased by plaintiffs' counsel, is that the statute "makes criminal any act done in a theatrical performance which would be criminal if done on Peachtree Street at high noon". Georgia's power to control the dissemination of obscenity in general is thus not at issue. Plaintiffs argue simply that the performing arts are entitled to a less restrictive standard than that which is applied to other, more public, activities. Before considering the merits of this argument, however, the Court must determine whether this is an appropriate case for the exercise of federal jurisdiction. For reasons set forth below, the Court con-

cludes that this is not such a case.

The Supreme Court's decision in Samuels v. Mackell is a convenient starting point, although it does not by itself provide the ultimate solution. There the Court held that "where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment . . ." 401 U.S. p. 73, 91 S.Ct. p. 768. As indicated above, this requires a showing of bad faith on the part of prosecution officials, a factor not present here.

Technically, of course, Samuels does not apply since there is no prosecution presently pending against these plaintiffs. Indeed the court concluded its opinion with the express caveat that "we * * * express no views on the propriety of declaratory relief when no state proceeding is pending at the time the federal suit is begun." Nevertheless, the considerations which led to the result in Samuels point compellingly toward the same result here. First, as the Supreme Court recognized in Samuels, the Declaratory Judgment Act provides that the grant of a declaratory judgment may be enforced by "further necessary or proper relief", 28 U.S.C.A. § 2202, and this may properly include the issuance of an injunction, See Also Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); Teas v. Twentieth Century-Fox Film Corp., 413

F.2d 1263 (5th Cir. 1969). To allow declaratory relief without requiring a showing of bad faith might well lead to circumvention of that requirement for injunctions as well. Second, even if the declaratory judgment does not lead to the issuance of an injunction, the former is no less disruptive of the state's criminal processes than the latter. As a practical matter, a declaratory judgment that the underlying state statute is unconstitutional precludes initiation of a criminal prosecution almost as effectively as an injunction directed against the prosecuting officials.

It must also be remembered that the Supreme Court's opinion in Boyle v. Landry does not contain the limiting language found in Samuels. In Boyle plaintiffs sought both injunctive and declaratory relief against enforcement of a number of Illinois statutes. Although prosecutions had been initiated under some of the statutes, none of the plaintiffs had been charged under the two statutes which were found to be unconstitutional by the three-judge district court. The Supreme Court reversed, citing Younger v. Harris and Samuels v. Mackell, and noted that "there is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens who brought this suit is in any jeopardy of suffering irreparable injury if the State is left free to prosecute * * * in the normal manner." 401 U.S. p. 81, 91 S.Ct. p. 760. Moreover, Hunter v. Allen, 286

F. Supp. 830 (N.D.Ga. 1968), decided by this Court, is also a case in which there were no pending prosecutions at the time federal suit was filed. This Court's grant of declaratory relief was affirmed by the Fifth Circuit, Hunter v. Allen, 422 F.2d 1158 (5th Cir. 1970), but was reversed outright by the Supreme Court in the wake of Younger v. Harris, etc. See Embry v. Allen, 401 U.S. 989, 91 S.Ct. 1237, 28 L.Ed.2d 528 (1971).[4] These decisions suggest strongly that, in spite of the caveat in Samuels, the Supreme Court may well intend to apply the same standard whether there is an outstanding prosecution or not.

Finally, had defendants moved without warning to make arrests and to institute formal prosecutions, plaintiffs would clearly be entitled to neither declaratory nor injunctive relief from this Court. This is the square holding of Younger v. Harris and Samuels v. Mackell. It strikes the Court as anomalous to reach the opposite result with regard to decla-

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4. The Supreme Court's orders of March 29, 1971, show that a number of other cases in which no prosecutions were pending were similarly disposed of. See 401 U.S. 984-990, 91 S.Ct. 1237. The remands ordered were apparently for the purpose of ascertainment of the existence of any "exceptional circumstances".

ratory relief solely because defendants did not choose to "shoot first and ask questions later". A decision on the request for declaratory judgment would simply open the starting gate for a race to the courthouse. So far as the appropriateness of federal intervention is concerned, the Court can perceive no real distinction between the present case and one in which an actual prosecution has already begun. Emphasis on the precise timing involved is largely artificial and, in the Court's view, should not be controlling.

A decision to the contrary would encourage abrupt strong-arm tactics on the part of officials rather than promote the altogether reasonable approach exercised here.

Accordingly, the Court concludes that neither injunctive nor declaratory relief[5]

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5. This is not to say that the Court cannot conceive of "exceptional circumstances" which might justify injunctive and/or declaratory relief in the Dombrowski tradition. Repeated vague and unspecific threats of arrest, or public warning to patrons, or a pattern of "raids" not followed up by the initiation of prosecution could all demonstrate bad faith harassment. In the area of films and books, repeated or gross seizures of materials without the subsequent prosecutions could likewise do so.

Conversely, the Court has considered

is appropriate in the circumstances of the present case. Defendants' motion to dismiss is therefore granted.

It is so ordered.

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the doctrine of abstention under the enunciated conditions whereby a limiting construction by the state courts could render the statute under attack unobjectionable. Compare Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970); Harrison v. N.A.A.C.P., 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152 (1959) with Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507. 27 L.Ed.2d 515 (1971); Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967).

As seen, the complainants here seek only to void the statute imposing the general indecency statute upon the ARTS (Ga. Code § 26-2105). The Act does so in unequivocal language not subject to any limiting construction except through the parent statute (Ga. Code § 26-2011) itself. As the latter is not questioned here, such solution is not available to resolve the present controversy. It thus appears that resolution will have to come from a direct attack on the statute in question through the state system.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3207

ALEX COOLEY, ET AL., etc.,
Plaintiffs-Appellants,

versus

WILLIAM BAER ENDICTOR, Assistant Solicitor of the Criminal Court of Fulton County, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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(April 3, 1972)

Before BELL, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: The district court denied both injunctive and declaratory relief against claimed threatened state court prosecution[1] of the producer and two

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[1]Under Georgia's indecent exposure statute, Ga. Code Ann. Sec. 26-2105; Ga. L. 1971, page 344.

female performers of a theatrical production "Stomp".[s] A fourth plaintiff was joined as a member of the theatre-going public.

The trial court entered full findings of fact and conclusions of law, basing its holding primarily upon *Boyle v. Landry*, 1971, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696, and the other cases composing the *Younger v. Harris*, 1971, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669, double trilogy of February 23, 1971.

Appellants have not demonstrated error in the proceedings below.

The judgment appealed from is

AFFIRMED.

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[s]The opinion and order of the district court are reported as *Cooley, et al. v. Endictor, et al.*, N.D. Ga. 1971, ____ F.Supp.

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Apr. 3, 1972, 5 Cir., 1972, ____ F.2d ____).

(May 22, 1972)

Before BELL, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in

regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.